

WHAT IN-HOUSE COUNSEL SHOULD KNOW ABOUT “GARDEN LEAVE” CLAUSES

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Your CEO just returned from a conference in London where he heard about this thing called “garden leave,” and he asks you: Can a company require its key U.S. employees to give lengthy advance warning of their intent to resign, send them home as soon as they give notice, and prohibit them from competing in any way until the notice period expires? The answer may well be yes. As in-house counsel, you need to be up to speed on this development, which is rapidly crossing the Atlantic and coming your way.

Under a carefully drawn garden leave clause, for the duration of the notice period under a carefully drawn garden leave clause, the employee:

- remains an employee owing a duty of loyalty to the company;
- loses access to company records and data, and thus cannot view or copy confidential business information;
- may not transmit confidential information to his future employer; and
- may not solicit clients or coworkers to follow him.

Adoption of garden leave clauses in the United States has included two conceptually distinct forms: (1) a pure “notice clause,” where the employee remains a paid employee during the notice period, and (2) a “noncompete with pay” model, in which employment terminates but the company agrees to pay the employee certain compensation during the restricted period, which may or may not be conditioned

Related People



Christopher P. Stief
Regional Managing Partner

[207.477.7007](tel:207.477.7007)

on proof of the employee's inability to find other work as a result of the clause.

In-house counsel should consult with business clients to identify the types of employees who pose sufficient risk to warrant paid time on the sideline, as well as to determine the type and duration of restraint needed. Through such collaboration between in-house counsel and key business leaders, companies may be able to introduce garden leave clauses as another layer of protection for the company against the loss of competitive assets when key employees defect.

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